No. 92-1077

In the Supreme Court of the United States

OCTOBER TERM, 1992

AMERICAN AIRLINES, INC., PETITIONER

v.

SCOTT DAVIES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether respondent's civil action challenging his dismissal for union activity is barred by 45 U.S.C. 153 First (i) and 184, which make the Railway Labor Act arbitration procedures the exclusive remedy for certain employment disputes.

2. Whether 45 U.S.C. 152 Third and Fourth, which give covered employees the right to organize and bargain collectively without interference by the employer, preempt state-law tort remedies for retaliatory discharges in violation of that federal right.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner employed respondent as an aircraft mechanic in Tulsa, Oklahoma. Respondent was covered by a collective bargaining agreement between petitioner and the Transport Workers Union (TWU). That agreement allowed petitioner to discharge respondent only for "just cause." Pet. App. 2a, 17a-18a.

Respondent served on the organizing committee of the Airline Mechanics Fraternal Association (AMFA), which was seeking to have a representation election held for the craft employees represented by the TWU. On October 9,

1989, respondent placed an advertisement in the local newspaper, announcing a debate between representatives of the TWU and the AMFA. Without petitioner's authorization, respondent placed the name "American Airlines" in the advertisement's heading. The advertisement was directed to all skilled labor and announced the participants, place, and time of the debate. Pet. App. 21a-22a, 25a.

After concluding that the advertisement violated its work rules, petitioner instituted formal disciplinary action against respondent. On October 19, 1989, petitioner concluded that respondent's unauthorized use of the words "American Airlines" in the advertisement violated work rule 21, which prohibits employees from making "false or slanderous statements about the Company," and work rule 24, which forbids employees from performing any act "detrimental" to the welfare of the company or fellow employees. Petitioner then informed respondent that he would either have to sign a letter of commitment agreeing to comply with company rules and regulations or be discharged. Pet. App. 22a-23a.

Respondent refused to sign the letter of commitment. Instead, on October 20, 1989, he filed suit in the United States District Court for the Northern District of Oklahoma, seeking a temporary restraining order against his dismissal. Respondent alleged that petitioner was terminating him because of his union organizing activities, in violation of the Railway Labor Act (RLA), 45 U.S.C. 152 Fourth. See Pet. C.A. App. Exh. 2. Later that day, petitioner discharged respondent (Pet. App. 24a), rendering his motion for a temporary restraining order moot.

Respondent initiated an arbitration proceeding, contending that his conduct did not violate the work rules. Pet. App. 34a-35a. He did not contend, however, that his termination was motivated by anti-union animus. *Ibid.* The grievance was referred to a System Board of

Adjustment, consisting of a company representative, a union representative, and a neutral referee. On January 24, 1990, the Board determined that respondent had violated the work rules and that discharge was an appropriate sanction. The Board noted that petitioner had explained to respondent that great harm could result from unauthorized use of petitioner's name, particularly in connection with an inter-union dispute. Nevertheless, the Board explained, "he remained recalcitrant in admitting error or in committing to desist from such action in the future." Pet. App. 38a-39a. Finally, the Board observed that respondent had offered a "patently absurd excuse" for his actions—specifically, that he had used the words "American Airlines" to refer not to petitioner, but to all airlines in America. *Id.* at 36a, 39a. Under those circumstances, the Board upheld the discharge. *Id.* at 39a. The Board did not, however, address petitioner's motivation for the termination.

2. While the arbitration proceedings were pending, respondent pursued the present civil action against petitioner in federal district court.[1] Respondent's amended complaint alleged that he was terminated "in retaliation for his attempts to organize and designate union representation of his choice" and that petitioner's action violated "public policy as found within * * * the Railway Labor Act, 45 U.S.C. § 152 Third and Fourth" and other sources of federal law. Pet. C.A. App. Exh. 10, at 1.[2]

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[1] In his first amended complaint, respondent alleged that federal jurisdiction was proper because he was alleging a violation of his rights under the RLA, 45 U.S.C. 152 Third and Fourth, to designate union representation without employer interference. See Pet. C.A. App. Exh. 3, at 1. In his second amended complaint, respondent relied on diversity of citizenship under 28 U.S.C. 1332. See Pet. C.A. App. Exh. 10, at 1.

[2] In addition to the RLA, respondent relied on the First Amendment and the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq*. See Pet. C.A. App. Exh. 10, at 1-2.

Respondent sought compensatory and punitive damages and either reinstatement or "front pay." *Id.* at 2.

Although the jury awarded respondent $81,000 in compensatory damages and $15,000 in punitive damages (Pet. 5), the district court granted petitioner's motion for judgment notwithstanding the verdict. First, the court noted that because respondent was not an at-will employee, he could not bring a state tort action for "the discharge of an at-will employee in violation of public policy." Pet. App. 18a (discussing *Burk* v. *K-Mart Corp.*, 770 P.2d 24 (Okla. 1989)). Second, the trial court held that, in any case, a state-law public policy tort was unavailable, because of the existence of an alternative remedy under the RLA. Pet. App. 18a-19a; see *id.* at 11a.

3. The court of appeals reversed. The court first observed that the RLA provides an exclusive arbitral remedy for "disputes * * * growing out of grievances or out of the interpretation or application" of collective bargaining agreements. 45 U.S.C. 153 First (i); see 45 U.S.C. 184; Pet. App. 4a. The court determined, however, that the tort action brought by respondent is not within the class of disputes covered by Sections 153 First (i) and 184, which are referred to under RLA case law as "minor disputes."[3] Relying on *Lingle* v. *Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), a case arising under Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. 185, the court of appeals held that a state-law claim is preempted by the arbitral provisions of the RLA if the resolution of the claim depends on the meaning of the collective bargaining agreement. Pet. App. 6a.

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[3] The terms "major dispute" and "minor dispute" do not appear in the RLA. Instead, this Court "adopted the major/minor terminology, drawn from the vocabulary of rail management and rail labor, as a shorthand method of describing two classes of controversy Congress had distinguished in the RLA: major disputes seek to create contractual rights, minor disputes to enforce them." *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, 491 U.S. 299, 302 (1989).

In the court's view, respondent's retaliatory discharge suit could be resolved without reference to the meaning of the collective bargaining agreement. As the court explained, "[t]he gravamen of [respondent's] action is that [petitioner's] actual or primary motivation in firing him, irrespective of any 'just cause' it may have had under the [collective bargaining agreement], was to stop his unionizing activity." Pet. App. 7a.[4]

4. In its petition for rehearing, petitioner argued for the first time that even if respondent's claim was not a minor dispute, remediable solely through arbitration, any state-law action based on retaliation for union organizing activity would be preempted by 45 U.S.C. 152 Third and Fourth—the provisions of the RLA that guarantee employees the right to select their collective bargaining representatives free of employer interference or coercion. On September 8, 1992, the court of appeals denied the petition without addressing that issue. Pet. App. 40a-41a.

DISCUSSION

In our view, the court of appeals correctly held that the claim in this case is not subject to the RLA's exclusive arbitral mechanism. The courts of appeals have consistently found that the RLA's exclusive arbitral mechanism for contract disputes does not foreclose a judicial remedy to vindicate the federal statutory right of rail and airline employees to select representatives of their choosing without employer interference. At the same time, we believe that respondent was required to bring his claim as a federal cause of action under the provisions of the RLA that protect an employee's union organizing activities, 45 U.S.C. 152 Third and Fourth, and not as a state-law claim.

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[4] The court of appeals also concluded that the state tort action for wrongful discharge in violation of public policy was not available only to at-will employees. Pet. App. 11a-14a. Hence, it reversed the trial court's award of judgment notwithstanding the verdict and reinstated the jury verdict in favor of respondent. *Id.* at 14a.

Petitioner did not timely raise this preemption issue, however, so it was never addressed by the court of appeals. There is no basis for concluding that the Tenth-Circuit (or any other court of appeals) would allow such a state-law action to proceed if the employer properly raises this preemption defense in a timely manner. Accordingly, there is no conflict in authority that warrants review at this time.

1. The Railway Labor Act, 45 U.S.C. 151 *et seq.*, was enacted, *inter alia*, to establish a mechanism for "the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. 151a(5); see 45 U.S.C. 153 First (i) (establishing arbitral mechanism for such disputes); 45 U.S.C. 184 (arbitral provision for such disputes in airline industry).[5] In resolving those so-called "minor disputes" (*Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 723 (1945), aff'd on rehearing, 327 U.S. 661 (1946)), the RLA first requires the parties to resort to a carrier's "internal dispute resolution processes." *Atchison, T. & S.F. Ry.* v. *Buell*, 480 U.S. 557, 563 (1987); see 45 U.S.C. 153 First (i), 184. If a dispute cannot be resolved internally, either party may then refer it to "arbitration before the National Railroad Adjustment Board * * * or before an adjustment board established by the employer and the unions representing the employees." *Consolidated Rail Corp.* v. *Railway Labor Executives' Ass'n*, 491 U.S. 299, 303-304 (1989) (*Conrail*); see 45 U.S.C. 153 First (i), Second.

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[5] Such disputes involve "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *Brotherhood of R.R. Trainmen* v. *Chicago R. & I. R.R.*, 353 U.S. 30, 33 (1957); see H.R. Rep. No. 1944, 73d Cong., 2d Sess. 2-3 (1934) (the bill "provide[s] sufficient and effective means for the settlement of minor disputes known as 'grievances', which develop from the interpretation and/or application of the contracts between the labor unions and the carriers, fixing wages and working conditions").

The submission of a dispute to arbitration is compulsory upon the request of either party. 45 U.S.C. 153 First (i), Second; see 45 U.S.C. 184; see also, *e.g.*, *Conrail*, 491 U.S. at 303; *Walker* v. *Southern Ry.*, 385 U.S. 196, 198 (1966). The decisions of an adjustment board are "final and binding." 45 U.S.C. 153 First (m), Second; see *Conrail*, 491 U.S. at 303.[6]

2. Petitioner argues that respondent's allegations of tortious activity should not have been adjudicated outside the arbitral process. In our view, the court of appeals correctly determined that respondent's tort claim—alleging that he had been discharged in violation of the RLA's policy against interfering with an employee's choice of union representative (45 U.S.C. 152 Third and Fourth)—is not a minor dispute subject to the exclusive arbitral mechanism of the Act.

a. The proper framework for evaluating the existence of a minor dispute is set forth in this Court's decision in *Conrail*, *supra*. In that case, the Court addressed whether a dispute over the carrier's implementation of an employee drug testing program was a "major" dispute over a change in the collective bargaining agreement—subject to the RLA's bargaining and mediation provisions—or a "minor" dispute—subject to compulsory arbitration.

In holding that the controversy at issue was a minor dispute, the Court in *Conrail* looked "to whether a claim

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[6] A similar scheme exists for the airline industry—to which Congress extended the RLA in 1936. Act of Apr. 10, 1936, ch. 166, 49 Stat. 1189; see 45 U.S.C. 181-188; *International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 685 (1963) (the purpose of the 1936 legislation was "to extend to air carriers and their employees the same benefits and obligations available and applicable in the railroad industry"). The principal difference, which is not material here, is that no national adjustment board has been established for airlines; hence, minor disputes are adjudicated exclusively by system adjustment boards formed by the airlines and the unions under 45 U.S.C. 184. See *Conrail*, 491 U.S. at 304 n.4; *Central Airlines*, 372 U.S. at 686.

has been made that the terms of an existing agreement either establish or refute the presence of a right to take the disputed action." 491 U.S. at 305. As the Court explained, "[t]he distinguishing feature of such a case [*i.e.*, a minor dispute] is that the dispute may be conclusively resolved by interpreting the existing [collective bargaining] agreement." *Ibid.* The Court made plain, moreover, that parties may not trigger the RLA's exclusive arbitral framework merely by asserting a contractual claim based on "insubstantial grounds." *Id.* at 306. Rather, when "an employer asserts a contractual right to take [a] contested action, the ensuing dispute is minor [only] if the action is arguably justified by the terms of the parties' collective-bargaining agreement." *Id.* at 307.

b. The conclusion of the court of appeals that respondent's tort claim does not constitute a minor dispute is fully supported by this Court's decision in *Conrail*. Irrespective of any terms of the collective bargaining agreement, respondent's claim cannot be "conclusively resolved" (*Conrail*, 491 U.S. at 305) by interpreting that agreement. As the Tenth Circuit explained, the tort claim in this case turned on a factual dispute about petitioner's motivation for terminating respondent—an issue that was not even addressed in the grievance proceedings. Because a collective bargaining agreement cannot eliminate substantive legal protections provided to employees independent of the agreement (see *Buell*, 480 U.S. at 563; *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 212 (1985) (LMRA)), the tort claim in this case could not be resolved by adjudicating the distinct legal question whether there was just cause for respondent's discharge under the labor contract. Pet. App. 6a. Respondent could not prevail on his tort claim even if he proved that petitioner lacked just cause to dismiss him under the contract, because the tort alleged required proof of unlawful animus. Conversely, even if the court found that respondent's work-rule violations gave petitioner just cause to discharge him

under the collective bargaining agreement, that finding could not "arguably justif[y]" (*Conrail*, 491 U.S. at 307) a discharge motivated by anti-union animus. In other words, as the court below concluded, this case does not present a minor dispute because "[t]he gravamen of [respondent's] action is that [petitioner's] actual or primary motivation in firing him, irrespective of any 'just cause' it may have had under the [collective bargaining agreement], was to stop his unionizing activity." Pet. App. 7a.

c. Petitioner contends that the court of appeals' analysis is insufficiently protective of the RLA's exclusive arbitral mechanism. Petitioner would read the "arguably justified" language in *Conrail* to require arbitration in motive-based tort cases whenever a carrier couches its factual defense in the legal terms of the collective bargaining agreement. Pet. 15-18. This argument misconstrues *Conrail* and the statutory scheme.

i. There were two aspects of the inquiry into whether a minor dispute existed in *Conrail*. First, the Court found that a minor dispute is one that may be "conclusively resolved" under the collective bargaining agreement. 491 U.S. at 305. Second, even if that threshold requirement is met, a dispute may not be subject to arbitration as a minor dispute if the basis for the contract claim is insubstantial —that is, if the conduct is not even "arguably justified" under the contract. *Id.* at 306-307. Petitioner seeks to turn that framework on its head. Although petitioner framed its defense in a way that referenced the contract—by arguing that it had just cause to dismiss respondent for violating the work rules under the collective bargaining agreement—respondent was not required to dispute that issue under applicable tort standards. The legal issue of just cause simply could not, as set forth, "conclusively resolve" a tort claim that turns on the factual question whether petitioner terminated respondent because of anti-union animus.

ii. Petitioner's interpretation of the statute would result in unduly broad preemption of state tort law, in contravention of this Court's precedents. Because "the text of the RLA does not mention * * * tort liability" (*Buell*, 480 U.S. at 562), the Act does not preempt States from adopting minimum substantive tort law duties, even if those duties relate to employment relationships covered by the Act. That conclusion is evident from this Court's decision in *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines, Inc.*, 372 U.S. 714 (1963). There, this Court rejected the claim that the RLA preempted a state statute "protecting employees against racial discrimination." *Id.* at 724. As the Court emphasized, "[n]o provision in the [RLA] even mentions discrimination in hiring," and nothing in the Act "suggests that [it] places upon an air carrier a duty to engage only in fair nondiscriminatory hiring practices." *Ibid.* Because the RLA "has never been used for that purpose," this Court found that the RLA did not preempt the state anti-discrimination statute at issue. *Ibid.*

In light of *Colorado Anti-Discrimination Comm'n*, the compulsory arbitration provisions of the RLA do not preempt claims premised upon state-law duties in areas of legitimate state concern that are independent of those assumed under the collective bargaining agreement. Otherwise, state regulation would be substantially displaced, or arbitrators would be required to adjudicate issues of state tort law. Neither result is consistent with this Court's cases governing the regulation of labor relations. See, *e.g.*, *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 21, 23 (1987) ("pre-emption should not be lightly inferred," because "the establishment of labor standards falls within the traditional police power of the State[s]" and "does not impermissibly intrude upon the collective-bargaining process"); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 53 (1974) (arbitrators exceed their authority if

they premise their decisions on a source of law outside the collective bargaining agreement).[7]

d. Petitioner further contends (Pet. 16) that the court of appeals erred in relying on *Lingle* v. *Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), a case arising under Section 301(a) of the LMRA, 29 U.S.C. 185(a), and not the RLA. We disagree.

Section 301(a) authorizes federal jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this [Act], or between any such labor organizations." 29 U.S.C. 185(a).[8] The Court in *Lingle* held that Section 301 did not preempt

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[7] We disagree with petitioner's contention (Pet. 18-19) that this Court's reference to the "omitted case" in *Burley*, 325 U.S. at 723, requires every dispute incidental to the employment relationship to be processed through the RLA's exclusive arbitral mechanism. *Burley* described a minor dispute as one that relates "either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case." 325 U.S. at 723. As this Court has noted, not all aspects of the contractual relationship between the union and employer are found in the particular provisions of a labor contract; rather, because a collective bargaining agreement must "govern a myriad of cases which the draftsmen cannot wholly anticipate," an agreement's express terms are necessarily supplemented by "practice, usage and custom." *Conrail*, 491 U.S. at 311-312. Properly understood, the "omitted case" merely refers to practice, usage, or custom that becomes part of the contractual relationship that the arbitrator enforces. Petitioner's broader reading of *Burley*—which would displace tort remedies for any dispute arising from railroad or airline employment—is inconsistent with the limited preemptive force of the arbitral provisions of the RLA.

[8] Under this Court's cases, disputes requiring the interpretation of labor contracts covered by Section 301 are governed by federal common law rules that preempt state rules of decision. See *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456 (1957); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 103 (1962). In *Lingle*, this Court addressed the extent to which preemption under Section 301 extends to tort claims arising from the employment relationship.

a state tort of retaliatory discharge for filing a worker's compensation claim. Noting that the elements of the state-law claim consisted of (1) dismissal of an employee and (2) a motive to deter or interfere with his filing a worker's compensation claim, the Court concluded:

> Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of a collective-bargaining agreement. To defend against a retaliatory discharge claim, an employer must show that it had a nonretaliatory reason for the discharge * * *; this purely factual inquiry likewise does not turn on the meaning of any provision of a collective-bargaining agreement.

486 U.S. at 407. Accordingly, the Court found that the state tort was " 'independent' of the collective-bargaining agreement" because its resolution did "not *require* construing [that] * * * agreement." *Ibid.* (emphasis added).

Lingle supplies an appropriate analogy in this case. To be sure, the standard for preemption articulated under *Lingle*—whether a state law claim requires the interpretation of a labor contract—is articulated somewhat differently from the standard for finding a minor dispute under *Conrail*—whether a dispute may be conclusively resolved by interpreting the collective bargaining agreement. It is also true that the RLA, unlike the LMRA, requires the arbitration of contract claims within its sweep.[9] See *Grote* v. *Trans World Airlines, Inc.*, 905

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[9] That distinction between the RLA and the LMRA should not be overstated. In establishing the framework for determining when a state tort action is preempted under Section 301, this Court confronted the need to "preserve[] the central role of arbitration in our 'system of industrial self-governance.' " *Lueck*, 471 U.S. at 219. The Court noted that the "need to preserve the effectiveness of arbitration was one of the central reasons that underlay the Court's [preemption] holding in *Lucas*

F.2d 1307, 1309-1310 (9th Cir.), cert. denied, 498 U.S. 958 (1990). Nevertheless, *Lingle* is instructive in the RLA context, because its analysis addresses a question common to both statutes—how to accommodate the federal interest in uniform interpretation of collective bargaining agreements and the legitimate interest of the States in adopting standards of conduct for employers subject to their police power. Compare, *e.g.*, *Lingle*, 486 U.S. at 409 (LMRA "says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of [collective bargaining] agreements") and *Lueck*, 471 U.S. at 212 (because LMRA "does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law," "it would be inconsistent with congressional intent under [Section 301] to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract") with *Colorado Anti-Discrimination Comm'n*, 372 U.S. at 724 (RLA does not preempt state anti-discrimination law).

Accordingly, although it is unclear whether the standards set forth in *Lingle* and *Conrail* would lead to the same result in every case, we believe that the court of appeals properly consulted the policies underlying *Lingle* to assist in defining the line between federal contract claims and tort claims in this case. In any case, because the court's decision was correct under *Conrail*, this case does not require consideration of the practical differences, if any, that may distinguish the *Lingle* and *Conrail* tests.

3. Petitioner argues (Pet. 19-20) that this case warrants further review to resolve a conflict among the

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Flour," and that the standard for preemption under Section 301 must protect the parties' "federal right to decide who is to resolve contract disputes." 471 U.S. at 219. Thus, although RLA preemption protects a direct statutory right to arbitration, LMRA preemption protects a statutory right to contract for an arbitral remedy.

circuits on the question whether retaliatory discharge claims are preempted under the RLA.

a. Petitioner relies (Pet. 20) on several cases holding that a state-law tort of retaliatory discharge is, in effect, a wrongful discharge claim subject to preemption under the RLA. Only one of those cases, however, *Grote* v. *Trans World Airlines, Inc.*, 905 F.2d 1307, 1309-1310 (9th Cir.), cert. denied, 498 U.S. 958 (1990), was decided subsequent to this Court's decisions in *Conrail* and *Lingle*. As set forth, those decisions clarified the proper approach for identifying RLA disputes subject to arbitration under Sections 153 First (i) and 184 and clarified the considerations that distinguish a substantive tort law claim from a claim implicating federal interests in uniform labor contract interpretation. Because this case was correctly decided under *Conrail* and *Lingle*, the earlier court of appeals decisions do not present a conflict warranting further review.[10]

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[10] Petitioner cites (Pet. 20 n.4) a number of decisions finding preemption where the rights asserted under state law were derived from the terms of the collective bargaining agreement. See *Edelman* v. *Western Airlines, Inc.*, 892 F.2d 839, 844-845 (9th Cir. 1989); *Zimmerman* v. *Atchison, T. & S.F. Ry.*, 888 F.2d 660, 662 (10th Cir. 1989) (per curiam); *Hodges* v. *Atchison, T. & S.F. Ry.*, 728 F.2d 414, 416-417 (10th Cir.), cert. denied, 469 U.S. 822 (1984); *Magnuson* v. *Burlington Northern, Inc.*, 576 F.2d 1367, 1368-1370 (9th Cir.), cert. denied, 439 U.S. 930 (1978). In contrast, respondent's claim is wholly independent of any rights he may have had under the collective bargaining agreement.

Petitioner also relies (Pet. 8) on *Lorenz* v. *CSX Transportation, Inc.*, 980 F.2d 263 (4th Cir. 1992), in which an employee brought a tort action for defamation arising out of statements made by his employer during a grievance adjustment and disciplinary action. We note that the RLA provides for arbitration of disputes "growing out of grievances or * * * the interpretation or application" of the collective bargaining agreement. 45 U.S.C. 153 First (i); see 45 U.S.C. 184. Where an employee files a lawsuit alleging that an employer engaged in misconduct during the grievance process, such a claim may be preempted under the RLA.

b. Although the Ninth Circuit's decision in *Grote* is premised upon a broader view of RLA preemption than the decision below, we do not believe that the differing approaches of the two courts call for the Court's review in this case. For the reasons set forth below, there is a substantial basis to conclude that both circuits may well resolve this issue in the same way in future cases.

i. The basis for the public policy tort alleged by respondent is the right, codified in 45 U.S.C. 152 Third and Fourth, of employees to select a collective bargaining representative without carrier coercion or interference.[11] In *Grote*, the employee alleged state torts of breach of the covenant of good faith and fair dealing, intentional and negligent infliction of emotional distress, and defamation. That distinction is significant. In finding that arbitration represented the employee's sole available remedy, the court in *Grote* emphasized that the result would have been

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Here, however, the dispute turns on the decision to terminate respondent, not the process by which the termination was accomplished.

[11] Section 152 Third provides that neither the carrier nor the employees "shall in any way interfere with, influence, or coerce the other in its choice of representatives." Section 152 Fourth, moreover, states that "[n]o carrier * * * shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and [that] it shall be unlawful for any carrier * * * to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization." This Court has recognized an implied right of action to enforce Section 152 Third and Fourth. See *Texas & N.O. R.R.* v. *Brotherhood of Ry. & Steamship Clerks*, 281 U.S. 548, 554-555, 569-570 (1930) (injunctive relief against carrier's interfering with, influencing, or coercing employees in organization and designation of representative); *Virginia Ry.* v. *Railway Employees*, 300 U.S. 515, 543-544 (1937) (dictum). While the Court has never defined in detail the scope of available relief under those provisions, it has indicated generally that when a private right of action is authorized, the Court will "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Franklin* v. *Gwinnett County Public Schools*, 112 S. Ct. 1028, 1032 (1992).

quite different if federal claims had been at issue. 905 F.2d at 1310.

As the court in *Grote* explained (905 F.2d at 1310), this Court in *Buell, supra*, recognized that the RLA's strong policy in favor of arbitration must give way when an employee's cause of action arises from a federal statute "designed to provide minimum substantive guarantees to individual workers." 480 U.S. at 565; see, *e.g.*, *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 737 (1981) (policy favoring arbitration under LMRA does not foreclose FLSA claim); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) (same for Title VII claim). In *Buell*, the Court held that a railroad employee could maintain an action for negligence under the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.*, even though that claim may have been subject to arbitration under the RLA. 480 U.S. at 564-567. Because Congress enacted the FELA to provide a remedy for workers injured by an employer's or co-worker's negligence, the Court found it "inconceivable" that Congress intended to limit federal relief to the arbitral remedies for minor disputes under the RLA. 480 U.S. at 565. The Court emphasized, moreover, that the FELA was designed to provide workers with "substantive protection * * * independent of the employer's obligations under its collective-bargaining agreement." *Ibid.*

Consistent with the reasoning of *Buell*, the courts of appeals have uniformly recognized that the RLA's minor dispute mechanism does not displace civil actions based on discrimination against an employee for exercising rights protected by and judicially enforceable under the RLA.[12]

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[12] We note that Section 152 Third and Fourth have force principally in the pre-certification context, when employees are selecting a collective bargaining representative. See, *e.g.*, *Trans World Airlines, Inc.* v. *Independent Federation of Flight Attendants*, 489 U.S. 426, 440-441 (1989). We believe, however, that the force of the RLA's protections logically must extend to representational disputes arising from an employee's efforts to select a new bargaining representative. As is the

See, *e.g.*, *Railway Labor Executives' Ass'n* v. *Boston & Maine Corp.*, 808 F.2d 150, 157-158 (1st Cir. 1986), cert. denied, 484 U.S. 830 (1987); *Roscello* v. *Southwest Airlines Co.*, 726 F.2d 217, 219-220 & n.2 (5th Cir. 1984) (allegation of discharge for union activity, in violation of Section 152, not preempted); *Conrad* v. *Delta Air Lines, Inc.*, 494 F.2d 914, 918 (7th Cir. 1974) (same); *Brotherhood of R.R. Trainmen* v. *Central of Georgia Ry.*, 305 F.2d 605, 607-609 (5th Cir. 1962) (same). Petitioner has not cited, and we are unaware of, any decision holding that a lawsuit to enforce union organizing rights under Section 152 of the RLA is foreclosed by the minor dispute mechanism of the RLA.[13]

ii. In addition, petitioner errs in contending (Pet. Reply Br. 3) that *Buell* is inapposite here, and that arbitration is required, because respondent proceeded on a state-law cause of action.[14] To the extent that petitioner challenges

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case in the pre-certification context, the dispute resolution procedures of the RLA—which are implemented by the carrier and the union—are unlikely to be effective when the allegation is that the employee was penalized by the employer for seeking to organize a new union.

[13] The availability of federal jurisdiction over cases arising under Section 152 Third and Fourth does not undermine the arbitral mechanism of the RLA. Particularly in cases involving an existing bargaining relationship, rather than an attempt to secure representation, a district court must dismiss or grant summary judgment on jurisdictional grounds unless the plaintiff has made and supported substantial allegations of anti-union animus. See, *e.g.*, *National R.R. Passenger Corp.* v. *International Ass'n of Machinists*, 915 F.2d 43, 50-53 (1st Cir. 1990); *Tello* v. *Soo Line R.R.*, 772 F.2d 458, 461-462 (8th Cir. 1985); *International Ass'n of Machinists* v. *Northwest Airlines, Inc.*, 673 F.2d 700, 709-712 (3d Cir. 1982) (district court must look at merits before taking jurisdiction). In establishing a claim under Section 152 Third and Fourth, moreover, the plaintiff bears a heavy burden. See *Trans World Airlines*, 489 U.S. at 440-441; *Virginia Ry.*, 300 U.S. at 549-553.

[14] In any case, while it is true that respondent framed his claim as a state-law tort of discharge in violation of public policy, that claim rested ultimately on federal rights. The Oklahoma public policy tort is available when a discharge "is contrary to a clear mandate of public

the award of state-law relief for a violation of the rights established by Section 152 Third and Fourth, that contention is properly viewed as a claim that those provisions of the RLA preempt state law on the subject matter of unlawful interference with union organizing.[15] Petitioner does not dispute that *Buell* would permit respondent to bring this suit under the RLA outside the arbitral process. See Pet. Reply Br. 3. Nor does petitioner contest that an employee has judicially enforceable rights under Section 152 Third and Fourth. See Pet. 13-14. Thus, petitioner does not in fact contest respondent's right to bring a lawsuit claiming that he was discharged on the basis of anti-union animus; rather, it maintains that that right should have been measured exclusively by federal law.

In our view, the federal cause of action available to redress violations of the RLA preempts a state-law cause of action, such as that asserted here, seeking damages under state law for violations of Section 152 Third and Fourth. The standards of liability and scope of redress available for such violations should be governed exclu-

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policy as articulated by constitutional, statutory or decisional law." *Burk* v. *K-Mart Corp.*, 770 P.2d 24, 28 (Okla. 1989). Here, as we have noted, respondent exclusively alleged violations of federal law. See Pet. C.A. App. Exh. 10, at 1-2 (Second Amended Complaint). In effect, respondent's action is an effort to secure state-law remedies for the federal right—explicitly guaranteed by the RLA—to engage in union organizing without coercion or interference by the employer. See Pet. C.A. App. Exh. 10, at 1 (Second Amended Complaint); Br. in Opp. 3.

[15] Apart from the question whether the arbitral provisions of the RLA preempt a lawsuit to enforce union organizing rights, petitioner presents the distinct question whether the provisions of the RLA that guarantee union organizing rights preempt a state-law cause of action. As we explain below, that issue is not presented in this case, because petitioner did not timely raise it in the courts below.

sively by federal law.[16] As petitioner acknowledges (Pet. 21 n.5.), however, it did not raise the preemptive effect of Section 152 Third and Fourth until its petition for rehearing in the court of appeals. The court of appeals denied the petition without addressing that issue. And, as petitioner notes (Pet. 21), neither this Court nor any court of appeals has squarely addressed that issue. As a result, it is not at all clear that the Tenth Circuit (or any other circuit) would permit the state-law claim alleged here to proceed if this distinct issue of RLA preemption were to be raised and adjudicated in a subsequent case. There is accordingly no conflict that warrants review at this time.

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[16] We do not believe that Congress intended to permit state law to serve as the basis for a judicial remedy for the rights covered by Section 152 Third and Fourth. That view is strongly supported by this Court's decision in *Colorado Anti-Discrimination Comm'n*, 372 U.S. at 724, which held that state anti-discrimination laws are not preempted because the RLA does not address that subject matter. Because Congress spoke with precision to the question of interference with the choice of a bargaining representative, state law should not be permitted to disrupt the careful scheme of relief that Congress crafted under the RLA. Cf. *Wisconsin Dep't of Industry, Labor & Human Relations* v. *Gould Inc.*, 475 U.S. 282, 286 (1986) (to prevent any conflict with the NLRA's "complex and interrelated federal scheme of law, remedy, and administration," principles of NLRA preemption prevent States from "providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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